DONNA BERSAUDARA SDN. BHD.

v.

CAPE CONTRACTS INTERNATIONAL LTD. & ANOR.

HIGH COURT, BRUNEI
DATO SIR DENYS ROBERTS CJ
[CIVIL SUIT NO. 10 OF 1991]
20 MARCH 1993

COMPANY LAW: Plaintiff a limited company - Defendant seeking security for costs - Application of s. 320 Companies Act - Principles applicable.

The plaintiff brought an action against the defendants. The defendants applied for an order that the plaintiff provide security for the costs of the defendants in the action on the grounds that if the defendants were successful in the action, the plaintiff would be unable to meet the defendants costs of the action.

Held:

[1] The fact that a company seems insolvent does not mean that security must follow, since it is still a matter for the discretion of the Court.

[2] Taking into account all the circumstances of the case, this was a proper case for the Court to exercise the discretion to order security for costs against the plaintiff.

[Plaintiff ordered to deposit BD15,000 in Court as security for costs before proceeding further with the action].

Cases referred to:

Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. [1973] 2 All ER 273 ***(foll)***

Pearson v. Naylor [1977] 3 All ER 531 ***(refd)***

Legislation referred to:

Companies Act, s. 320

Companies Act 1985, s. 726 (UK)

Other sources referred to:

White Book, 1991 Edn., p. 418

JUDGMENT

Sir Denys Roberts CJ:

Nature of application

The defendants applied by the above summons for an order requiring the plaintiff to give sufficient security for the costs of the defendants in this action.

It was not disputed by the plaintiff that there is jurisdiction to make an order in the terms sought, by virtue of s. 320 of the Companies Act, which states -

> 320. Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

The plaintiff being a limited company, the first question which falls to be decided is whether the plaintiff is able to pay the defendants' costs, if the latter should succeed.

Evidence in support

In his affidavit of 9 February 1993, sworn by Mr. Andrew Ong on behalf of the defendants, several matters were listed, the effect of which was, it was said, to render the plaintiff unable to meet the costs of the defendants if it loses.

A search of the company register on 10 August 1991 showed that there was a deed of debenture created by the plaintiff in favour of the Chartered Bank to secure general banking facilities granted to the plaintiff.

In his affidavit of 10 March, Dato Noordin bin Haji Mohd. Noor, a director of the plaintiff, admits that this assertion is correct. Neither party to the action states what the deed of debenture relates to, nor the value of the property or other assets which must be the subject of the debenture. In the absence of any such information, I must discount this debenture as indicating the inability of the plaintiff to pay its debts.

The share capital of the company is said to amount to BD2 only, though there is a nominal share capital of BD5000,000. Dato Noordin replies that it is open to the shareholders of the company to call for additional capital. While this is correct, there has been no such call since the plaintiff was formed, which seems to have been at least ten years ago, so that only the smaller amount is available to meet the plaintiff's debts.

On 1 September 1986, the Overseas Union Bank Ltd. obtained judgment in default against the plaintiff for BD192,122.59. On 1 April 1991, judgment was obtained against the plaintiff's guarantors, which included Dato Noordin, for BD252,729.69. The latter amount included interest and costs and related to the same debt as that owed by the plaintiff in the first action.

It was said by the plaintiff, in reply, that the amount due from Dato Noordin and others as guarantors, had been met by Dato Noordin. This is, however, some indication that the plaintiff itself is unable to pay its debts.

Solicitors for the defendants wrote to the plaintiff's solicitors on 20 October 1992, asking them to provide verifiable information that would establish the ability of the plaintiff to pay the costs of the defendants, if the latter were successful.

In reply, on 2 December 1992, the plaintiff's solicitors enclosed letters and other documents, the effect of which was, it was said, to prove that the plaintiff had assets worth BD371,627.

Without commenting in detail on the items listed in that letter, it is sufficient to say that some of them appear to be in the ownership of GRP Marine Ind. Sdn. Bhd. and others to be the property of Dato Noordin. None of the items appears to belong to the plaintiff.

The accounts of the plaintiff, which were produced, show that the plaintiff maintained a largely dormant account in the International Bank of Brunei (IBB). In December 1990 the plaintiff's balance was BD12,008. Thereafter, the next transaction was in July 1991, at the end of which the balance was BD27,152. The next use of the account was in July 92, at the end of which there was a balance of BD1009. The account was next used in January 1993, when there were two transactions into and out of the account, leaving the plaintiff with a balance of BD1009.

This is not the picture of an active company, but of one which is so dormant that it only makes very occasional use of the bank account which it maintains. Its balance is small and insufficient to meet any substantial debt. Nor was it suggested that any other money was due to the plaintiff.

A bank draft for BD103,000, in favour of the company, was produced by the plaintiff. It was a time deposit which ran only from 15-22 March. No information was forthcoming as to the source of this money or its purpose. As it only lasted for a week, in any event, I could not regard it as evidence of the ability of the plaintiff to meet its debts.

Sir Lindsay Parkinson case

The principles which a Court should follow, when deciding if security for costs should be ordered under s. 726 of the U.K. Companies Act 1985, (which is in similar terms to s. 320 of the Brunei Companies Act) are set out in *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] 2 All ER 273.

These are summarized in the 1991 Edition of the White Book at p. 418. Having emphasized that a Court has a discretion whether or not to order security, having regard to all the circumstances of the case, it lists the following matters as among those which a Court might take into account -

(1) whether the plaintiff's claim is *bona fide* and not a sham;
(2) whether the plaintiff has a reasonably good prospect of success;
(3) whether there is any admission by the defendants on the pleadings or elsewhere that money is due;
(4) whether there is a substantial payment into Court or an open offer of a substantial amount;
(5) whether the application for security was being used oppressively - eg. so as to stifle a genuine claim;
(6) whether the plaintiff's want of means has been brought about by any conduct of the defendants, such as delay in payment or in doing their part of the work;
(7) whether the application for security is made at a late stage in the proceedings.

This is not an exhaustive list, and includes only examples of matters which a Court may take into account before it exercises its discretion.

As was made clear in *Pearson v. Naylor* [1977] 3 All ER 531, the Court must not allow this provision for security to be used as an instrument of oppression, so as to shut out a small company from making a genuine claim against a large company.

Although the statement of claim was issued on 15 January 1991, an amended claim was issued on 13 November 1992, when the plaintiff sought various remedies which had not been set out in earlier pleadings.

Shortly before this, on 13 October 1992, the defendants asked the plaintiff for verification of its ability to pay, though there is no suggestion that these two incidents were linked. In reply, the plaintiff gave an answer which was both inadequate and misleading.

It must, of course, be recognized that I cannot, on the basis of the pleadings alone, form a proper view as to the prospects of success of the plaintiff, other than to note that the plaintiff's claim seems to rest largely upon oral agreements, the existence of which are denied by the defendants.

On the pleadings, although the claim is an unusual one, I cannot say that it is a sham or that it does not have some prospect of success. There is, however, no admission by the defendants that anything is due to the plaintiff and there has been no payment into Court nor any open offer.

I do not consider that the want of means of the plaintiff can be said to be due to the defendants, as the plaintiff company must have been formed well before the supposed oral agreement between it and the defendants about the terms of a joint venture.

The application for security is made at a late stage in the proceedings, as the writ was issued in January 1991 and the summons for directions in June 1991. The defendants assert, however, and this I accept, that they did not know of the poverty of the plaintiff until this came to their attention in October 1992, when Dato Noordin paid off the debt incurred by the plaintiff.

Nor do I consider that this application is brought merely to stifle a genuine claim. It is, I am persuaded, made because there is a real fear on the part of the defendants that they will be left out of pocket if they do succeed.

Conclusion

I have taken into account that -

(a) the fact that a company seems insolvent does not mean that security must follow, since it is still a matter for the discretion of the Court;

(b) if there is reason to believe that a company cannot pay the costs, security may be ordered, 'not must be' ordered; it remains a matter of discretion.

Taking into account all the circumstances, I believe that this is a proper case in which I should exercise the discretion which a Court has to order security for costs where the plaintiff is a limited company.

Quantum

The defendants have submitted a draft bill of costs for BD75,000 or so. Of this large sum, BD5,000 consists of various charges, which seem on the face of them to be reasonable and unavoidable. The remainder was attributed to a 7 days trial, at BD10,000 a day.

Security may be given for costs already incurred, as well as for those which may be in future. I do not, however, see that BD10,000, which would apparently cover representation separately by each of two defendants, is a reasonable daily sum.

It will, of course, be necessary for the defendants' solicitors to undertake preparatory work for the trial. I consider that BD5,000 should be awarded for this.

The defendants did not ask for security beyond the first day of trial. I think this is reasonable in this instance, though it is open to the Court, in the exercise of its discretion, to order a more substantial amount where appropriate. There is no hard and fast rule about this and it may in some cases be right to give security on a more generous basis, though seldom on that of full indemnity. I will allow a further BD5,000 for the first day of trial.

Order

I therefore order as follows:

(a) under s. 320 of the Companies Act, I direct the plaintiff to give security for such costs as may be awarded against it to the defendants;

(b) the amount of security will be BD15,000, by the deposit of cash in Court or by the provision of a banker's guarantee for that amount;

(c) no steps in the action shall be taken by the plaintiff until the cash is deposited or the guarantee furnished;

(d) the guarantee shall last until payment of any costs awarded to the defendants against the plaintiff at the conclusion of civil suit No. 10 of 1991;
(e) the costs of this application should be paid by the plaintiff, such costs to be taxed if not agreed.

ENERGY PILING

v.

RTA CONSTRUCTION (B) LTD.

HIGH COURT, BRUNEI
DATO SIR DENYS ROBERTS CJ
[CIVIL SUIT NO. 62 OF 1990]
11 JANUARY 1993

COMPANY LAW: Judgment in default obtained against company - Registrar ordering directors to pay balance of judgment debt - Whether directors personally liable for debt.

The plaintiff obtained judgment in default against the defendant. The directors of the defendant were ordered to be examined as to the ability of the defendant to pay. One of the directors made an offer "without prejudice" to repay the debts of the defendant from his own resources. Upon being informed that the defendant was to be wound up, the plaintiff sought an order that the directors pay the balance of the judgment sum and the Registrar so ordered.

Held:

[1] In the absence of any undertaking to the contrary, the director of a company cannot be held liable for the debts of a company.

[2] There was no unequivocal acceptance of liability by the directors. The directors made an offer, on a without prejudice basis, to pay part of the debt owed to the plaintiff but that was all.

[Appeal allowed with costs].

JUDGMENT

Sir Denys Roberts CJ:

This is an appeal against an order made by a registrar on 27 July 1992.

The plaintiff obtained judgment, in default of appearance by the defendant, on 7 June 1990, for BD56,991.85 and interest and costs.

The plaintiff had issued a writ and statement of claim on 21 March 1990, claiming these amounts against the defendant for construction works carried out by the plaintiff at Muara, Brunei Darussalam, in accordance with a written contract dated 28 January 1988.